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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

Nos. 6, 7 and 8.

LEWIS J. VALENTINE, Police Commissioner of the City of New York, EDWARD T. V. FITZGERALD, his Agent having in custody the Relators, and CHARLES DE FERRY DE FONTNOUVELLE, Consul General of the French Republic,

Petitioners,

against

UNITED STATES on the Relation of B. COLES NEIDECKER,

Respondent.

THE SAME

Petitioners,

against

UNITED STATES on the Relation of GEORGE W. NEIDECKER,

Respondent.

THE SAME

Petitioners,

against

UNITED STATES on the Relation of AUBREY NEIDECKER,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

FREDERIC R. COUDERT,
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MAHLON B. DOING,
Of Counsel for Respondents.

INDEX.

	PAGE
STATEMENT	1
BRIEF OF THE ARGUMENT	2
SUMMARY OF THE ARGUMENT	3
OPINIONS BELOW	6
ARGUMENT	9
I. American authority is practically unanimous in construing the terms of the French Extradition Treaty of 1909 as exempting American citizens from its operation	9
Reply to Petitioners' Points "II", "IV" and "V"	25
II. It was the intent of the parties in concluding the French Extradition Treaty of 1909 to positively exempt citizens from its operation	29
Reply to Petitioners' Points "III" and "VI"	36
III. A construction of the French Extradition Treaty of 1909 as vesting discretion in the Executive to extradite American citizens, would be unconstitutional	39
Reply to Petitioners' Points "I" and "VII"	45
CONCLUSION	53

CASES CITED.

	PAGE
Amiable Isabella, The, 6 Wheaton (U. S.) 1	26
Charlton *v.* Kelly, 229 U. S. 447	16-21 incl., et passim
Charlton, Ex parte, 185 Fed. 880	8, 21, 23
Cherokee Tobacco case, 11 Wall. (U. S.) 616, 620	39
Doe *v.* Braden, 57 U. S. 635, 656	40
Drossner, In re (E. D. Wisconsin, December 7, 1935; unreported)	9
Ezeta, In re, 62 Fed. 972, 996	44
Galwey, In re, [1896], 1 Q. B. 230	24, 25, 29, 40, 45, 48-52 incl.
Geoffroy *v.* Riggs, 133 U. S. 266	40
Giozza *v.* Tiernan, 148 U. S. 657, 662	42, 43
Holmes *v.* Jennison, 14 Peters (U. S.) 574	10, 26
Hurtado *v.* United States, 110 U. S. 516, 531	45
McCabe, Ex parte, 46 Fed. 363	10-16 incl., et passim
National Co. *v.* United States, 252 U. S. 140, 146	30
Reg. *v.* Wilson [1877], 3 Q. B. 42, 46	50
Schechter *v.* United States, 295 U. S. 723	41
Stupp, In re, 23 Fed. Cas. 296, 302	44
Sullivan *v.* Kidd, 254 U. S. 433	22
United States *v.* Cerecedo, 209 U. S. 337, 339	30
United States *v.* Faulk, 204 U. S. 143, 152	30
United States *v.* Rauscher, 110 U. S. 407	10, 47

STATUTES CITED.

	PAGE
British Extradition Act of 1870 (33 and 34 Vict. c. 52) Section 6	48, 49
Constitution of the United States, Article I, Section 1	41
Constitution of the United States, Amendment V	42
French Extradition Law of March 10, 1927	31
French Statute of June 27, 1866	32
U. S. C. A. 18, Section 651	12, 44

TREATIES CITED.

American Extradition Treaties:	
With Albania, 1933 (Treaty Series No. 902)	36
" Argentina, 1896, (Malloy, Vol. 1, p. 25)	34, 36
" Austria, 1930, (46 Stat. p. 2779)	36
" Bulgaria, 1924, (43 Stat. p. 1886)	35
" Costa Rica, 1922, (Malloy, Vol. 3, p. 2548)	35
" Dominican Republic, 1867, (Malloy, Vol. 1, p. 403)	21
" Ecuador, 1872, (Malloy, Vol. 1, p. 436)	21
" Esthonia, 1923, (43 Stat. p. 1849)	35
" Finland, 1924 (44 Stat. p. 2002)	35
" France, 1843, (Malloy, Vol. 1, p. 526)	4, 5, 29, 30, 34
" " , 1909, (Malloy, Vol. 3, p. 2580)	passim
" Germany, 1930, (47 Stat. p. 1862)	36
" Great Britain, 1889, (Malloy, Vol. 1, p. 740)	21
" " " , 1931, (47 Stat. p. 2122)	35
" Greece, 1931, (47 Stat. p. 2185)	36
" Guatemala, 1903, (Malloy, Vol. 1, p. 878)	34, 43
" Iraq, 1934, (Treaty Series, No. 907)	36
" Italy, 1868, (1884), (Malloy, Vol. 1, p. 966)	16, 17, 21
" Japan, 1886, (Malloy, Vol. 1, p. 1025)	20, 34
" Latvia, 1923, (43 Stat. p. 1738)	35

PAGE

American Extradition Treaties (Continued):

With Lithuania, 1924, (43 Stat. p. 1835) 35
" Mexico, 1861, (Malloy, Vol. 1, p. 1125)..9, 22, 35
" " , 1899, (Malloy, Vol. 1, p. 1184)..34, 35, 43
" Nicaragua, 1905, (Malloy, Vol. 2, p. 1292) 34, 43
" Orange Free State, 1896, (Malloy, Vol. 2, p. 1313) 34
" Paraguay, 1913, (Malloy, Vol. 3, p. 2783) 35
" Poland, 1927, (46 Stat. p. 2282) 36
" Prussia, 1852, (Malloy, Vol. 2, p. 1501) .. 23, 24
" Roumania, 1924, (44 Stat. p. 2020) 36
" Siam, 1922, (43 Stat. p. 1749) 35
" Two Sicilies, 1855, (Malloy, Vol. 2, p. 1814) 38
" Uruguay, 1905, (Malloy, Vol. 2, p. 1825).. 34, 43
" Venezuela, 1860, (Malloy, Vol. 2, p. 1845) 21
" " , 1922, (Malloy, Vol. 3, p. 2870) 35

British Extradition Treaties:

With Belgium, 1876 49
" " , 1887 50
" France, 1843 33
" Switzerland 49

OTHER CITATIONS.

American & English Encyclopedia of Law and Procedure, Vol. VII, p. 616..... 28

Boston University Law Review, Vol. XIV (1934), p. 610 29

Circular of Instruction of April 5, 1841, by the Minister of Justice of France to all District Attorneys of France..... 33

PAGE

Corpus Juris, Vol. 25, p. 278 28
Crandall, Treaties Their Making and Enforcement (Second Edition), pp. 160 and 246 40

Despagnet, Public International Law, pp. 324, 325 .. 32
Documents Parlementaires (1909) Chambre des Deputes, Annexe 2391 36–37
Documents Parlementaires (1909) Senat, Annexe 2338 37

French Charter of 1814 32

Garraud, Criminal Law, pp. 142, 3, 4 33

Lawrence's Wheaton on International Law, Generally 28

Manton, "Extradition of Nationals", Temple Law Quarterly, Vol. X. (November, 1935), pp. 12, 19 ..... 6, 7, 39
Moore, Extradition, Vol. I, Sec. 135 ..... 23, 27
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Moore, International Law Digest, Vol. IV—p. 295 .. 38
Moore, International Law Digest, Vol. IV.—p. 298 .. 34, 37

Opinions of Attorney General, Vol. 17, pp. 184, 185 .. 44
Oppenheim on International Law (Fourth Edition, 1928), Vol. I, p. 569 28

Research in International Law, Harvard Law School (1935), Part I, Extradition, p. 123 ..... 30, 31
Research in International Law, Harvard Law School (1935), Part I, Extradition, p. 124 and Note 10 ..... 28, 47, 48
Research in International Law, Harvard Law School (1935), Part I, Extradition, p. 125 32

PAGE

Research in International Law, Harvard Law School (1935), Part I, Extradition, p. 126 28

Saint Aubin, L'Extradition et le Droit Extraditionnel (1913), Vol. I, p. 309 ..... 28, 29
Spear, Extradition, Generally 10, 28

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Wharton, Conflict of Laws (Second Edition), Sec. 841 28
Wharton, Conflict of Laws (Third Edition), Sec. 841 28

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BRIEF FOR RESPONDENTS.

Statement.

We do not object to the petitioners' statement of the nature of the case and of the question presented, although the latter is somewhat more broadly stated than is necessary.

We do maintain, with the majority of the Circuit Court of Appeals of the Second Circuit in this case, that no

authority or power is created in either the judiciary or the Executive to extradite American citizens to France for any crime whatever under the Extradition Treaty of 1909 between the United States and France, because of Article V thereof, which provides:

> "Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention."

We shall not attempt to answer the seven points of the petitioners' argument *seriatim,* because we believe that a re-grouping of the points of the argument will be more conducive to an orderly and proper presentation thereof.

BRIEF OF THE ARGUMENT.

Our argument, therefore, will be made, as it was below, under the following three points:—

POINT I.

American authority is practically unanimous in construing the terms of the French Extradition Treaty of 1909 as exempting American citizens from its operation.

At the end of this point we will answer petitioners' Points II, IV, and V.

POINT II.

It was the intent of the parties in concluding the French Extradition Treaty of 1909 to positively exempt citizens from its operation.

Under this point we shall reply to petitioners' Points III and VI.

POINT III.

A construction of the French Extradition Treaty of 1909 as vesting discretion in the executive to extradite American citizens, would be unconstitutional.

Under this point we distinguish the English authorities upon which the petitioners so largely rely. Consequently, under this point we shall answer petitioners' Points "I" and "VII" which are supported by the British authorities.

Summary of the Argument.

The basis of the decision below herein is that the relators are native born citizens of the United States and that as such they are exempt from the operation of the Extradition Treaty under color of which they were held.

The Treaty, Article I, provides in general terms for the extradition of persons "charged with certain crimes" as follows:

> "The Government of the United States and the Government of France mutually agree to deliver up persons who, having been charged with or convicted of any of the crimes or offences specified in the following article, committed within the jurisdiction of one of the contracting Parties, shall seek an asylum or be found within the territories of the other; Provided That this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial if the crime or offence had been there committed."

The foregoing Article is, however, subject to the express limitation of Article V, to wit:

> "Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention."

Petitioners contend that the foregoing provisions of the Treaty have the effect of conferring upon the Executive the discretionary right and power to deliver up citizens as and when it may elect.

We, on the contrary, and the majority of the Circuit Court of Appeals of the Second Circuit, take the position that the effect of Article V is to wholly deprive the Executive of the right and power to deliver up any American citizen.

The question is not one of first impression. The very words of Article V first appear in an American extradition treaty in 1852—that with Prussia—and have since found their way into nearly every one of our extradition treaties. As is stated in the preamble of the Prussian Treaty, the reason for the incorporation of this clause is the attainment of "strict reciprocity" with those States which refuse the extradition of their own nationals.

The precise significance of the provision of the present Article V was first established by the Secretary of State in 1877 upon an application for extradition, pursuant to the Mexican Treaty of 1861, framed in language identical with that here in question. Upon that occasion and in three cases arising subsequently, successive Secretaries of State held that, by virtue of this provision, the Executive was without right or power to extradite citizens, and refused to act.

In 1891 the United States District Court in Texas, in *Ex Parte McCabe*, 46 F. 363, upon application for a writ of habeas corpus, sustained the position of the Secretaries of State and ordered the discharge of the prisoner. This was the leading case upon the subject. Its authority has been uniformly recognized to the present day by the State Department, by text writers, and, at least implicitly, by this Court in *Charlton* v. *Kelly*, 229 U. S. 447.

Prior to 1909, one of the very few American treaties which did not contain a provision similar to that of the present Article V, was that with France of 1843. The old

Treaty was supplanted by the new Treaty of 1909, now before the Court. The new Treaty differed from the old one primarily in the addition of Article V. The language of the additional Article, having appeared in treaties for some sixty years, and having been the subject of a uniform and unbroken current of construction over a period of 42 years, had in 1909 acquired an almost classic significance. It meant that as the American Executive had no power to deliver up its citizens upon the demand of the other party to such Treaty, such citizens were to be exempt. The reason for its incorporation at this time in the French Treaty is not far to seek. The municipal law of France did not permit the extradition of its citizens. Addition of the new clause, therefore, merely reestablished the strict reciprocity which has always been the foundation of American extradition treaties. It is inconceivable that in concluding the Treaty of 1909, the treaty-making power should have intended to clothe this language with a significance other than that acquired through the long evolutionary process hereinbefore outlined. It is therefore submitted that in negotiating the Treaty of 1909 with France it was the intent of the parties that citizens of the respective States should be exempt from the operation of the Treaty.

Thus, our first point is that by long continued and uniform construction, judicial and executive, the necessary effect of Article V is to positively exempt American citizens from the operation of the Treaty.

Our second point is in a sense corollary to the first. The language of Article V having acquired a precise and recognized significance at the time the Treaty was concluded, it must have been the intent and purpose of the parties to employ it in its accepted sense, to wit, that it constituted a positive exemption.

Our third point goes to the question of constitutional limitation. Even if the question were *res integra*, it would be necessary to decide it as have the State Department, the District Court in the *McCabe* case, and the majority of the

Circuit Court of Appeals in this case. To decide otherwise would bring the Treaty in conflict with the constitutional inhibition against both improper delegation of legislative authority and deprivation of due process.

The Opinions Below.

The opinion of the majority of the Circuit Court of Appeals in this case as written by Judge Hand, is in itself an admirable exposition of our position. As, however, the opinion relied upon other points, it was not deemed necessary to consider the constitutional question discussed in Point III of this Brief.

We respectfully submit that the logic of the conclusion arrived at in the dissenting opinion below, upon which the petitioners so largely rely, will not withstand careful scrutiny.

That opinion first considers briefly the history of the international policy of refusal to extradite nationals, and arrives at the not illogical conclusion that the extradition of all, nationals included, is "a desideratum of the most enlightened publicists". Yet, Judge Manton's quotation from the opinion of Professor Puente establishes that, however much we may deplore the inability to obtain uniform and universal extradition of criminals internationally, the fact is that the prevailing opinion in Latin America and elsewhere today is against the surrender of nationals for trial in the tribunals of a foreign state. It is this very fact and our own insistence upon reciprocity, which has led the United States to enter into the treaties, such as that here involved with France, which exempt American nationals.

Judge Manton himself, in an article, entitled "Extradition of Nationals," which he wrote for the *Temple Law Quarterly* shortly prior to the argument of these cases before the Circuit Court of Appeals, expressly concedes

> "* * * that the present practice of nations is overwhelmingly against the extradition of their own nationals" (p. 12),

and, speaking of reciprocity as a principle in the extradition of nationals, says:

> "This is the principle upon which all international relations should rest, and it should certainly be so with the extradition of nationals" (10 Temple Law Quarterly 12, at 19).

The dissenting opinion relies upon the following quotation from the decision of this Court in *Charlton* vs. *Kelly, supra*, but, in drawing conclusions, completely ignores the significance of the italicized clauses.

> "The conclusion we reach is, that there is no principle of international law by which citizens are excepted out of an agreement to surrender 'persons', *where no such exception is made in the treaty itself.* Upon the contrary, the word 'persons' includes all persons *when not qualified as it is in some of the treaties between this and other nations.*"
> (81 Fed. (2) 32 at 36, italics ours.)

As is so clearly pointed out in the majority opinion herein, this Court in the *Charlton* case classified our extradition treaties into two classes, those which require the surrender of nationals, and those in which the Prussian clause (which is the same clause as that here involved) "exempts" them. Consequently, the very quotation from the opinion of this Court upon which the dissenting opinion relies, contains in itself the qualification which destroys completely the entire effect of Judge Manton's argument.

Judge Manton's principal criticism of the decision in the case of *Ex parte McCabe,* 46 Fed. 663, is that its conclusions are based upon a "dogmatic declaration without any exposition of reasons in its support". (81 Fed. (2) 32 at 37.)

We respectfully submit that the opinion in the *McCabe* case, far from being dogmatic and without any exposition of reasons in its support, is an excellent and careful analysis of the whole law upon the subject and we respectfully refer to that opinion in support of our argument in this case.

In disposing of our constitutional argument, the dissenting opinion below first relies upon the opinion of the Mexican Judge Vallarta, which is referred to in the *McCabe* case, as authority for the conclusion that a discretion in the American Executive to arbitrarily choose between two American citizens for purposes of extradition, is neither arbitrary nor capricious.

The dissenting opinion finally disposes of our constitutional argument by a reference to the decision of the District Court in *Ex parte Charlton*, 185 Fed. 880, which was affirmed by this Court under the name of *Charlton* v. *Kelly*, *supra*. The quotation which Judge Manton cites from the decision of Judge Rellstab in that case not only fails to dispose of our constitutional argument but, on the contrary, supports it. Judge Rellstab, in effect, says that the constitutional argument is to be determined solely by the answer to the question "whether there is an existing treaty between the United States and Italy which *requires* that *Charlton* shall be surrendered to the demanding government." He then proceeds to the conclusion that the treaty between the United States and Italy was in existence and that it *required* the extradition of all American citizens. By exactly the same logic Judge Rellstab must have come to the conclusion in our situation that because the French Treaty does not *require* the surrender of American citizens, the surrender of an American citizen by the Executive thereunder would constitute the deprivation of due process of law.

As between the majority and minority opinions of the Circuit Court of Appeals in this case, we respectfully submit that authority and logic support that of the majority.

POINT I.

American authority is practically unanimous in construing the terms of the French Extradition Treaty of 1909 as exempting American citizens from its operation.

The question first came before the executive and judicial authorities in connection with the Extradition Treaty of 1861 with Mexico. Article VI of the Mexican Treaty was couched in the very words of Article V of the present French Treaty.

Upon four separate occasions between 1877 and 1891, four Secretaries of State refused to extradite citizens upon demand of the Mexican Government on the ground that under the terms of the Treaty the President lacked the right and power to do so.

In 1891, the position taken by the Secretaries of State was sustained by the United States District Court for Texas (*Ex Parte McCabe*, 43 F. 363). Many years later the *McCabe* decision was by clear implication approved by this Court in *Charlton* v. *Kelly*, 229 U. S. 447, and it has now been expressly approved and followed by the majority of the Circuit Court of Appeals in this case. We know nothing of the recent decision by Geiger, J., referred to at page 11 of the petitioners' brief. Certainly, in the absence of an opinion, it is entitled to but little consideration in the face of the authority now arrayed against it.

The decision in the *McCabe* case was so well considered and expressed that it furnishes not only an invaluable precedent but an admirable exposition of our position. We are therefore constrained to quote at some length from the opinion of Judge Maxey.

Article VI of the Mexican Treaty was as follows:

> "Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this Treaty."

Judge Maxey first considered at length the question as to whether or not in the absence of a treaty the Executive had the right to surrender any fugitive from the justice of a foreign nation, and concluded, upon the basis of *Holmes* v. *Jennison*, 14 Peters 574, *United States* v. *Rauscher*, 119 U. S. 407, and other authorities, that the following quotation from *Spear, Extradition*, stated the American law upon the subject:

> "The preponderance of authority derived from practice, the legislation of congress, the opinions of the attorney generals of the United States, and the deliverances of the judiciary, both state and federal, clearly show that no department of the general government is either bound or authorized to deliver up fugitive criminals from other countries, except in those cases for which provision is made by treaty. The powers of the government are bestowed by the constitution; and, except as it may be clothed with the extradition power through treaties, no such power is found among the express or implied grants to congress, or among those to the executive department, or among the powers given to the federal judiciary. *There can be no discretion in the exercise of the power, since it does not exist at all*" (p. 372, italics ours).

Judge Maxey then continued, at page 374:

> "What, then, was the purpose and intention of the two governments in inserting the stipulation: 'Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty?' We have seen that, with substantial unanimity, American jurists and statesmen recognized, under the law of nations, no obligation to surrender a fugitive, whether citizen or alien, and that by our government it was never done except in few, if more than one, isolated instances. Hence the resulting necessity to enter into treaty engagements for that purpose. Hence the extradition statute of 1848 and amendments, embodied in Rev. St. § 5270 *et seq.*, which, in conjunction with treaties, the supreme court

affirms in Rauscher's Case, supra, 'are in their nature exclusive.' If there were no pre-existing obligation to extradite a fugitive, the obligation must necessarily grow out of either statute law or treaty engagement. It is therefore apparent that the purpose of the treaty was to authorize the parties to do something which they had no previous authority to do. The parties come together, through their respective representatives, and make an agreement—an obligatory, binding agreement—to surrender, under certain circumstances, persons who commit crimes and flee from offended justice. They are authorized to act as they bind themselves. The agreement is mutual, the rights and obligations reciprocal. If power to surrender be not affirmatively given, the right to demand a fugitive can have no existence. The right to demand implies, *ex vi termini*, the corresponding authority and obligation to surrender. But both to exist should be founded upon express stipulations. The agreement here is, in article 1 of the treaty, that the contracting parties shall, on requisition made in their name, deliver up persons, who, being accused of crimes, etc. 'Persons', without qualification, would necessarily include all persons, citizens and aliens alike; and, under that general designation, the executive, it is believed, could not lawfully withhold the surrender of an American citizen upon requisition made by the republic of Mexico. But the treaty does not stop there. A subsequent limiting clause denies the obligation to surrender a citizen: 'Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty.' The obligation to deliver being denied, upon what can rest the authority? It did not exist in our government, as already shown, independent of treaty engagements, or, if existing as a mere matter of comity or courtesy, there was no lawful mode of enforcing it; and certainly it finds no countenance either in the constitution or laws of congress. The former is silent as to extradition, considered from an international standpoint, and simply confers the general power to make treaties; from which springs the right of the treaty-making power to negotiate with foreign governments for the extradi-

tion of fugitives. All the inferences and deductions to be drawn from the statutes would seem clearly to support the view taken by the court; *that is, there should be a binding treaty stipulation to authorize the executive to surrender a fugitive.* The first act of congress on the subject was approved August 12, 1848. Its caption reads: 'An act for giving effect to certain treaty stipulations between this and foreign governments, for the apprehension and delivering up of certain offenders.' *9 St. at Large, 302. Section 5270, Rev. St., which is, in substance, the same as the first section of the act of 1848, provides that, if the officer upon the preliminary hearing deems the evidence sufficient to sustain the charge, 'he shall certify the same * * * to the secretary of state, that a warrant may issue upon the requisition of the proper authorities for the surrender of such person, according to the stipulations of the treaty or convention.' The warrant for surrender does not issue according to the will or discretion of the executive, but agreeably to the stipulation of the treaty; that is to say, according as the parties have obligated themselves by treaty engagements.* If it were otherwise, if the executive could at his option and in his discretion transport for trial to a foreign country a person accused of crime, he would in such cases exercise a power which, it is thought, finds no sanction under our constitutional form of government. While nations are not careful to screen criminals seeking an asylum in their midst, personal liberty is so jealously guarded by the American constitution that its safety and security should not be dependent upon the exercise of the arbitrary will and discretion of any official, however lofty his official station. *The statute, therefore, employing apt words to confine the warrant of surrender to that class of persons and offenses as to which the parties have entered into binding treaty stipulations, should be held to exclude other classes, and to deny authority or discretion to surrender where the obligation is by treaty expressly denied.*" (Italics ours.)

It is to be noted, in connection with the foregoing passage, that the extradition statute referred to remains unchanged (18 U. S. C. A. §651).

After analyzing all the existent American extradition treaties, Judge Maxey continued:

> "As indicating the construction given by Mr. Lawrence, a writer of distinction, to the clause of the treaty in question, he makes the following classification of our extradition treaties:
> '(1) those excepting the subjects of the other contracting power. (2) Those containing no such exception.' Under the first are embraced treaties with Mexico, Prussia, and others. The second includes those with Great Britain, Switzerland, etc. Whart. Confl. Laws, § 857 notes. To same effect see 7 Amer. & Eng. Enc. Law, pp. 616, 617, par 11. 'Some of the extradiction treaties of the United States,' says Mr. Spear, 'expressly provide that neither party shall be required to deliver up its own citizens, which is equivalent to saying that neither will, in respect to such citizens, furnish any facility to the other for bringing them to justice for any offense which they may commit against its laws; and hence, if, under such a treaty, either party should by mistake deliver up one of its citizens it clearly would not be allowable for the other to put that citizen on trial upon the pretext that the terms of the treaty relate only to the extradition, and have no relation whatever to the trial, either as to the person or the offense to be tried.' Spear, Extradition, 79.
>
> "All of our law-writers, without an exception, brought to the attention of the court, concur in the opinion that the sixth article of the treaty with Mexico forbids the United States from surrendering their own citizens. Nor is there less uniformity in the practical construction given that article by the department of state. And such construction by a department of the government charged with the administration of a law, although not binding upon the courts, should properly receive great weight when the law is sought to be judicially construed" (pp. 377, 8).

Judge Maxey then summarized the State Department precedents:

> "To the consideration, then, of the practice of the state department in construing the last clause of the

sixth article of the treaty the attention of the court will be next briefly directed.

"(1) In 1874, says Mr. Frelinghuysen, in discussing the Trimble case, a Mexican, Francisco Perez, charged with the murder of Joseph Alexander, an American, at Brownsville, Tex., escaped into Mexico, and Mr. Fish, secretary of state, declined to prefer a formal requisition to the Mexican Government for the surrender of the fugitive.

"(2) The Mexican authorities in 1884 made demand on our government for the extradition of Alexander Trimble, a citizen of the United States, who was accused of crimes committed in the Republic of Mexico. The secretary of state, Mr. Frelinghuysen, construing the treaty as inhibiting the surrender of an American citizen, refused to deliver up Trimble. In a carefully prepared opinion in that case he states his conclusion in the following words: 'I understand the treaty with Mexico as reading thus: "The president shall be bound to surrender any person guilty of crime, unless such person is a citizen of the United States."' Senate Ex. Doc. No. 98, 1st Sess. 48th Cong.

"(3) Charles Hudson, an American citizen, was held in Texas, in 1888, for extradition to Mexico on a charge of robbery committed in that republic. In response to a letter from the governor of Texas, Mr. Bayard, secretary of state, replies:

> "'I have the honor to acknowledge the receipt of your letter of the 18th instant in relation to the case of Charles Hudson, held in Texas for extradition to Mexico on a charge of robbery. It being alleged that Hudson is a citizen of the United States, you request to be informed whether the department will adhere to its former ruling in the Trimble case, since that ruling, if applied to the case in question, might prevent the extradition of the prisoner, and render futile the efforts and expenditures of the Mexican government to obtain his surrender. As the decision of the department in the Trimble case is understood, it was held that as, under the extradition treaty between the United States and Mexico,

"neither of the contracting parties shall be bound to deliver up its own citizens," the president would not be authorized, in the absence of an express grant of power under the laws of the United States, to surrender to Mexico a citizen of the United States. The treaty provision referred to, which is found similarly stated in many of our extradition treaties, was held to negative any obligation to surrender, and thus to leave the authorities of this government without authority to act in such a case. After due consideration, the department is of opinion that the construction given to the treaty in the Trimble case is correct.' (See letter on file in department of state, Austin, Tex.)

"(4) More recently, and within the past 60 days, the question was considered by Mr. Blaine, present secretary of state, whose letter to W. H. Crain is published in the public prints. Dr. Martinez, it is said, was basely assassinated on the streets of Laredo, Tex., by persons who fled to Mexico. On behalf of citizens of Laredo, Mr. Crain requested the state department to take steps looking to the extradition of the assassins. That portion of the secretary's letter deemed pertinent to the present question reads as follows:

"'The department regrets that the present conventional relations between the United States and Mexico do not admit of a demand for the extradition of the assassins, since it is stated they are citizens of Mexico. Present treaty provides that neither of the contracting parties shall be bound to deliver up its citizens, and, as this clause has been held to preclude the surrender of a citizen of the United States, Mexico refuses to give up her citizens. This question was last agitated in the well-known case of Alexander Trimble and his associates, who were charged with murder and robbery in 1884. They were arrested in Texas with a view of their extradition by the authorities of that state, and when the case was reported to their government, and the fact of their citizenship of the United States was disclosed, this department interfered, and they were discharged. In view of this,

and several prior and subsequent cases in which a similar construction has been given to the treaty, this government is precluded from demanding the extradition of the fugitives in the present instance.'

"*Thus it appears that, extending through a period of 17 years, 4 different administrations of the federal government have invariably held that no authority was conferred upon the executive, by the sixth article of the treaty, either to demand of the Mexican authorities the extradition of their subjects committing crimes in the United States, or to surrender an American citizen upon demand made by the Republic of Mexico.* Following the construction so consistently applied to the treaty, the executive department, whose appropriate duty it is to execute the treaty pursuant to its stipulations and statutory requirements, has uniformly refused to surrender our own citizens; and it may be well said, if doubt exist as to the true construction of the treaty, which the court freely admits is not entertained in the present case, this contemporaneous and uniform interpretation 'ought to turn the scale.' So far as the court is advised, there is but one opinion of the question by law-writers and the executive department of our own country." (pp. 378, 9, italics ours.)

In addition to the well reasoned opinion in the *McCabe* case, there is the decision of this Court in the case of *Charlton* v. *Kelly, supra.* The authority of that decision for the construction of this Treaty for which we contend may not at first glance be apparent. But a considered analysis of the opinion of this Court will establish it as a very direct authority in our favor, as it was considered by a majority of the Circuit Court of Appeals herein.

In that case Charlton, an American citizen, opposed his extradition to Italy upon the charge of murder under the Treaty with Italy of 1884. The Treaty simply provided for the extradition of all "persons" and did not contain the provision that neither party should be bound to surrender its own citizens. It therefore purported to impose an un-

limited obligation to extradite alien and citizen alike. Italy, however, over the objection of the Government of the United States, had consistently refused to extradite its own nationals. Charlton's counsel argued that Italy's refusal to extradite its own nationals under this Treaty constituted a breach of the Treaty which relieved the American Government of any obligation to extradite its own citizens thereunder. Counsel then maintained, as we do here, that in the absence of an obligation imposed by the Treaty to extradite American citizens, the Executive lacked the constitutional power to extradite them.

This argument was thus disposed of by this Court:

(a) That, regardless of the breach of the Treaty by Italy, in the absence of renunciation thereof by the United States (which had not taken place), it remained in full force and effect;

(b) That the Treaty, by calling for the extradition of all "persons", without the qualification that neither party should be bound to extradite its own citizens, obligated the United States to extradite its own citizens; that, in view of the existence of an express obligation assumed by the United States to extradite its own citizens, among others, the constitutional argument, that it would be a violation of due process of law to extradite an American citizen in the absence of an express obligation to do so, did not apply.

However, in the opinion of the Court, the view was clearly expressed that American treaties which contain the provision that neither party shall be bound to deliver up its own citizens expressly exclude, exempt and except American citizens from their operation.

Upon the question as to the meaning of the word "persons", unmodified by subsequent words of limitation, in an extradition treaty the Court said:

> "We shall pass by the effect of the Penal Code in preventing the authorities of Italy from carrying out its international engagements to surrender citi-

zens, for that has no bearing upon the question now under consideration, which is, whether under accepted principles of international law, citizens are to be regarded as not embraced within an extradition treaty unless expressly included. That it has come to be the practice with a preponderant number of nations to refuse to deliver its citizens, is true; but this exception is convincingly shown by Mr. Blaine in his reply to the Foreign Minister of Italy and by the thorough consideration of the whole subject by Mr. John Bassett Moore, in his treatise on extradition, ch. V, pp. 152, 193, to be of modern origin. The beginning of the exemption is traced to the practice between France and the Low Countries in the eighteenth century. Owing to the existence in the municipal law of many nations of provisions prohibiting the extradition of citizens, *the United States has in several of its extradition treaties clauses exempting citizens from their obligation. The treaties in force in 1910 may, therefore, be divided into two classes, those which expressly exempt citizens, and those which do not.* Those which do contain the limitation are by far the larger number. Among the treaties which provide for the extradition of 'persons', without limitation or qualification are the following:

With Great Britain, August 9, 1842, extended July 12, 1889, United States Treaties, 1910, pp. 650 and 740.

With France, November 9, 1843, supra, p. 526.

With Italy, February 8, 1868, supra, p. 961.

With Venezuela, August 27, 1860, supra, p. 1845.

With Ecuador, June 28, 1872, supra, p. 436.

With Dominican Republic, February 8, 1867, supra, p. 403.

The Treaty with Japan of April 29, 1886, supra, p. 1025, contains a qualification in these words:

'Art. VII. Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention, but they shall have the power to deliver them up if in their discretion it be deemed proper to do so.'

The conclusion we reach is, that there is no principle of international law by which citizens are

excepted out of an agreement to surrender 'persons', where no such exception is made in the treaty itself. Upon the contrary, *the word 'persons' includes all persons when not qualified as it is in some of the treaties between this and other nations.* That this country has made such an exception in some of its conventions and not in others, demonstrates that the contracting parties were fully aware of the consequences unless there was a clause qualifying the word 'persons'. This interpretation has been consistently upheld by the United States, and enforced under the several treaties which do not exempt citizens. That Italy has not conformed to this view, and the effect of this attitude will be considered later. But that the United States has always construed its obligation as embracing its citizens is illustrated by the action of the executive branch of the Government in this very instance. A construction of a treaty by the political department of the government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is nevertheless of much weight.

The subject is summed up by Mr. John Bassett Moore in his work on extradition, vol. 1, p. 170, §138, where he says:

"'Persons' includes citizens. In respect to the persons to be surrendered, the extradition treaties of the United States all employ the general term 'persons' or 'all persons'. Hence, where no express exception is made, the treaties warrant no distinction as to nationality. Writing on the general subject of the extradition treaties of the United States and the practice thereunder, Mr. Seward said: *'In some of the United States' extradition treaties it is stipulated that the citizens or subjects of the parties shall not be surrendered.* Where there is no express reservation of the kind, there would not, it is presumed, be any hesitation in giving up a citizen of the United States to be tried abroad.' Such has been the uniform and unquestioned practice under the treaty with Great Britain of 1842, in which the term 'all persons' is used." (pp. 466 to 468, italics ours.)

It will thus be seen that this Court, following in effect the *McCabe* decision and the authorities therein cited, places our extradition treaties in two classes:

> "those which expressly exempt citizens, and those which do not." (p. 467.)

Of the extradition treaties of the United States in force in 1910, six were in the second of the two classes defined by the Court, and contained no limitation as to the persons extraditable thereunder.

All the remaining treaties were placed by this Court in the first of the two classes, as those treaties which expressly exempt American citizens. Of such treaties, sixteen contained a clause in exactly the same language as the French Treaty of 1909. Two provided that neither of the contracting parties should be *obliged* to surrender its own citizens, and one provided that the contracting parties should not be *required* to surrender its own citizens. The remaining seven contained a provision similar to that in the Japanese Treaty, mentioned by this Court, reading:

> "Neither government shall be bound to deliver its own citizens for extradition under this convention; but either shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so."

This Court thus placed all of these Treaties, except the six first above mentioned, in the same category, as expressly exempting American citizens from their operation It also assimilated even those Treaties which purported expressly to confer a discretionary power upon the American government or executive, to those Treaties which it characterized as exempting citizens from their operation.

In any event, no extradition treaty in force in 1910 contained an exemption of American citizens in stronger language than that contained in the French Treaty of 1909, and therefore, that Treaty, and the many others containing the same clause, must necessarily be included among

those treaties which this Court referred to as stipulating "that the citizens or subjects of the parties shall not be surrendered."

In its opinion this Court, in effect, concurs in the following view so precisely expressed by the District Court in the same case:

> "In thirty-one of the thirty-six treaties made by this Government with foreign countries, in which the word 'persons' is used, there have been inserted specific clauses *expressly excluding from the operation of such treaties,* the citizens and subjects of such countries."
>
> (185 Fed. Rep. 880, at 886.)

The five Treaties to which reference is there made are those mentioned in the opinion of this Court, to wit, the Treaties with Great Britain, Italy, Venezuela, Ecuador and the Dominican Republic, which contain no limitation of persons extraditable thereunder. *The remaining thirty-one, which are thus held to expressly exclude American citizens, obviously include the treaties such as the present French Treaty.*

It is apparent, therefore, that the decision in the *Charlton* case is direct authority for the proposition that the provision in an extradition treaty that neither of the contracting parties shall be bound to surrender its own citizens, constitutes a qualification of and limitation upon the word "persons" as used in such treaty, and expressly exempts and excludes American citizens from the operation thereof.

The majority opinion below expressly agrees with our interpretation of this Court's opinion in the *Charlton* case. However, both the dissenting opinion below and the petitioners' brief herein, while relying upon that decision for certain fundamental propositions of extradition law, completely ignore its obvious authority in our favor.

However, even if the foregoing decisions were not deemed to be direct and binding judicial authority for the construction of this Treaty as exempting American citizens from its

operation, the same conclusion would be arrived at *a priori* by a consideration of the determining factors in the construction of such a treaty; to wit, the intention of the parties as evidenced by the practical construction which they have consistently placed thereon.

As is pointed out in both of the foregoing decisions, the practical construction placed by the Executive upon a treaty is of almost compelling force, in the absence of other standards of interpretation.

The principle is thus restated in the recent case of *Sullivan* v. *Kidd*, 254 U. S. 433, at 442:

> "While the question of the construction of treaties is judicial in its nature, and courts when called upon to act should be careful to see that international engagements are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the Executive Department of the Government, charged with the supervision of our foreign relations, should be given much weight. Charlton *v.* Kelly, 229 U. S. 447, 468. See also Castro *v.* De Uriarte, 16 Fed. Rep. 93, 98 (opinion by Judge Addison Brown)."

The provision of the French Treaty of 1909 is contained in the identical or substantially identical language in the great majority of our extradition treaties. One of the earliest in which it is found was the Treaty between the United States and Mexico of 1861, which employed the following language:

> "Neither of the contracting parties shall be bound to deliver up its own citizen under the stipulations of this treaty."
> (Article VI, *Malloy, Treaties,* Vol. 1, p. 1127.)

The fact of the contiguity of Mexico to the United States gave rise to the early establishment of an executive policy and construction with reference to this clause of the Treaty.

Illustrations of the consistent interpretation of this clause by the Executive Department of the United States are fully set forth in the opinion in the *McCabe* case, *supra*, commencing at p. 378, leading to the following conclusion arrived at by Judge Maxey:

> "Thus it appears that extending through a period of 17 years, [from 1874 to the date of the decision], 4 different administrations of the federal government have invariably held that no authority was conferred upon the executive, by the Sixth article of the Treaty * * * to surrender an American citizen upon demand made by the Republic of Mexico." (p. 379.)

Judge Moore, whose authority upon the subject of extradition was recognized by this Court in the *Charlton* case, makes the following comment upon the position of the Government of the United States with regard to such a clause:

> "Section 135. Case of *Trimble*. The question of the power of the Government of the United States to surrender its citizens under the Treaty with Mexico, was elaborately discussed in 1884, in the case of Alexander Trimble, an American citizen whose extradition was demanded on charges of robbery and murder. The Government of the United States declined to order his surrender, on the ground that, *as the Treaty negatived any obligation to do so, the President was not vested with legal authority to act. To this position the Government of the United States has adhered.*" (Moore, Extradition, Vol. I, § 135, italics ours.)

Moreover, the provision exempting American citizens first appeared in an American extradition treaty in 1852, in the Treaty with Prussia, which provided in Article III thereof:

> "None of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention."

In the very preamble to that treaty is found an expression of the purpose of incorporating such a restrictive clause, thus:

> "* * * The Government of the United States, *with a view of making the convention strictly reciprocal*, shall be equally free from any obligation to surrender citizens of the United States. * * *" (Malloy, Treaties, Vol. 2, pp. 1501-2, italics ours.)

We thus find in the terms of the very first treaty embodying the mooted clause, the expressed view of the treaty-making power of the United States that such clause renders the United States

> "free from any obligation to surrender citizens of the United States."

There has been no deviation from this construction by the Executive Department of the Government of the United States.

In conclusion upon this point, it will be observed that the American position with respect to the interpretation of the language of Article V of this Treaty, is based upon the lack of power in the Executive to extradite an American citizen in the absence of a binding obligation imposed by treaty. Such lack of power results from the constitutional limitations upon both the Legislative and Executive Departments under the American system of government.

Reliance was placed by the petitioners and by the dissenting Judge in the Court below, upon the decision of the English Court of Queens Bench in the case of *In Re Galwey* [1896] 1 Q. B. 230, in which it was held that a provision of the Extradition Treaty between Great Britain and Belgium, similar in language to that here involved, authorized the British Government to deliver up British subjects.

Quite aside from the fact that the decision of the English Court conflicts with the foregoing American authorities, and can thus furnish no guide, the vital points of distinction are that the *Galwey* decision was rendered in a country

where the Government is not subject to the constitutional limitations existing in the United States, and that, moreover, the reasoning of the English Court in reality tends to sustain our own view. We shall discuss and distinguish the *Galwey* case in its proper position in Point III of this Brief.

Reply to Petitioners' Points "II", "IV" and "V".

We submit that if it were not for the decision of the English Court in the case of *In re Galwey* and the *ad hominem* argument that the construction adopted by the majority of the Circuit Court of Appeals in this case is "repugnant to justice", there would not be sufficient basis for even a colorable argument in favor of the petitioners.

In Point II of their brief herein, the petitioners say that there are thirty-two other extradition treaties containing this same clause, and that if the majority of the Circuit Court of Appeals in the instant case are correct, then American citizens in every one of these countries may commit crime with the same immunity as is now claimed in respect of crimes committed in France. To this we reply that when each one of those thirty-two treaties was entered into the American Government knew exactly the meaning of the words which were employed, and it employed them advisedly and with the intention that they should have the very meaning for which we contend.

The American Government did not desire to exempt American citizens from extradition to the countries involved in those treaties but it was compelled to do so because the other countries involved insisted upon exempting their own citizens. The United States has never considered that the trial of their own citizens by those countries for crimes committed abroad was an acceptable substitute for extradition. In discussing the proposed Treaty with Venezuela signed at Caracas on June 6, 1894, in which a stipulation was inserted to the effect that neither government should be bound to surrender its own citizens, the

Secretary of State objected that such a Treaty *excluded* citizens from its operation and further stated:

> "Although Venezuela may undertake to punish her subjects who, after committing crime here, return within her jurisdiction, yet the means of ascertaining the truth and doing justice must under such circumstances, always be difficult and often unattainable."
>
> (Moore's International Law Digest, Vol. IV, p. 288.)

As is shown by the decision in *Holmes* v. *Jennison,* 14 Peters (U. S.) 574, for a period of approximately forty years prior to 1842, the Government of the United States extradited no one (much less citizens) to foreign countries.

At this very day there are nations with which the United States has no extradition treaties and to which, therefore, no one can be extradited, whether American citizen or alien. This may be considered an unsatisfactory situation, yet no one but the treaty-making power can correct it.

Moreover, the courts are not concerned with abstract principles of theoretical justice in the interpretation of treaties.

> "We are to find out the intention of the parties by just rules of interpretation applied to the subject matter, and, having found that, our duty is to follow it as far as it goes, and to stop where that stops, *whatever may be the imperfections or difficulties which it leaves behind.*"
>
> *The Amiable Isabella,* 6 Wheaton, 1 at 71.

In Point IV of their brief the petitioners urge that the present attitude of the Department of State appears to be one of neutrality, at the same time admitting that at all times prior to the decision of the District Judge in these cases in 1935, the State Department appears to have considered itself bound by the *McCabe* decision.

Quite naturally, with the decision of the District Judge in the cases at bar in direct conflict with the decision in the

McCabe case, the State Department was anxious to have this judicial controversy disposed of by the higher courts.

Such attitude of the State Department cannot obscure the fact that in 1909, when the French Treaty was negotiated, it was the established practice of the State Department to construe the clause in question as definitely exempting American citizens.

Petitioners also urge that the practice of the State Department in the construction of such a treaty as this was not, in fact, uniform, because Secretary Frelinghuysen, after having refused to deliver up Trimble to Mexico in 1884, expressed the opinion that the question should ultimately receive judicial determination. However, years later, in 1894, the President of the United States expressed the view, through the Secretary of State, that a treaty which provided that neither Government should be bound to surrender its own citizens *excluded* such citizens from its operation. (*Moore Digest of International Law,* Vol. IV, p. 288.)

Judge Moore, in the quotation set forth at page 23, *supra,* says that the Government of the United States has adhered to the position that under such a Treaty provision the President is not vested with legal authority to extradite an American citizen.

It is at this point that we may give attention to Point V of the Petitioners' argument, in which they attempt to sustain the following proposition

> "The Franco-American Treaty, and other treaties containing similar language, have *regularly* been interpreted by text writers as conferring a discretion on the Executive."

In view of the state of opinion among the text writers upon the subject, this assertion of the petitioners is, to say the least, startling.

We need only refer to the quotations from the opinion of Judge Maxey in the *McCabe* case, *supra,* to establish that

the views of the text writers to whom he there refers are exactly the opposite of those for which the petitioners' contend. His quotations from *Spear* and *Lawrence* show those authors as opposed to the views of petitioners.

At page 377 of the *McCabe* opinion reference is also made to a note to §841 of Wharton Conflict of Laws (Second Edition) which expresses the view that a treaty containing this clause expressly prohibits the surrender of an American citizen. Exactly the same note appears at the same place in the Third Edition of Wharton on Conflict of Laws.

In the "Research in International Law" of the Harvard Law School, 1935, at page 126, upon the subject of extradition, the following note appears:

> "Under the treaties to which the United States is a party and which provide that neither party shall be bound to extradite its nationals, the President has been held without constitutional power to deliver a national of the United States.
>
> *Moore Extradition,* (1891) Vol. I, § 135, pp. 166-167."

In the same work at page 124, note 10, in commenting upon a similar clause in our treaties, it is said:

> "Under such treaty the President has no constitutional power to surrender nationals."

In Vol. VII American and English Encyclopedia of Law and Procedure at page 616 and in 25 C. J. at page 278, it is said that under an American Treaty which provides that neither of the contracting parties shall be bound to surrender its citizens, there can be no such surrender.

In support of their assertion, the petitioners quote only from *Oppenheim* and from two French writers. (Pp. 33-35 Petitioners Brief).

It is quite apparent that none of these authorities purports to express the American point of view. *Oppenheim* was obviously referring only to the British position as

evidenced by the decision in *Re Galwey,* which is hereinafter discussed. As far as the two French writers are concerned, it is rather amusing to note that they speak of the existence of a discretion in the extradition from France of a French citizen, despite the fact that since 1820, at least, it has been impossible to obtain the extradition of a Frenchman from France.

As opposed to the two Law Journal articles referred to by the petitioners at page 5 of their Brief, which are critical of the present state of the law as embodied in the majority opinion below, largely upon the ground that the opposite view would be "functionally better", we may refer to the obviously unbiased and objective statement of the law as set forth in an article in 14 *Boston University Law Review* (1934) at page 610:

> "In most extradition conventions to which the United States is a party there are provisions exempting the signatories from the duty of surrendering their own citizens. Where there is a stipulation in a treaty that neither of the contracting nations shall be bound to deliver up its own citizens or subjects *there can be no surrender.*" (Italics ours.)

POINT II.

It was the intent of the parties in concluding the French Extradition Treaty of 1909 to positively exempt citizens from its operation.

The extradition treaty with France of 1843, which was modified by the Treaty of 1909, contained no exemption of citizens. By 1909, when the new treaty was made including the new provision that neither government should be *bound* to extradite its own nationals, the clause so added had long since acquired a clearly defined and recognized significance as a result of the *McCabe* decision and of many years of consistent interpretation by the Executive Department.

Such interpretation, therefore, is presumed to have been a part of the clause as thus employed. *United States* v. *Faulk*, 204 U. S. 143, at 152; *National Co.* v. *United States*, 252 U. S. 140 at 146; *United States* v. *Cerecedo*, 209 U. S. 337 at 339.

There can be no doubt that the inclusion of that clause in this treaty at a time when it had acquired such definite meaning is practically conclusive as to the intention of the treaty-making power. Surely, the State Department cannot have construed the clause in one sense for the purpose of denying extradition under one treaty, and in a contradictory sense for the purpose of negotiating and concluding another treaty! That the State Department in negotiating a new treaty with France intended to use the clause in its theretofore accepted sense, is clear from a consideration of the background of treaty relations with France, and the contemporaneous state of the extradition law of France.

The French Treaty of 1843 contained no limitation in favor of citizens. Yet no Frenchman had ever been extradited to the United States, for the reason that French municipal law and policy forbade such extradition. It was obviously to correct this anomalous situation and to restore that condition of "strict reciprocity" which has been the foundation of our extradition policy, that the new treaty of 1909 was concluded.

In the light of the French municipal law and the acquired significance of the language employed in Article V of the Treaty of 1909, the inference is irresistible that both parties intended to positively and absolutely exempt their own citizens from extradition.

The consistent position of France with respect to the extradition of its nationals is stated as recently as 1935 by the group of distinguished scholars charged with editing the *Harvard Research on International Law*, Part I, Extradition, at page 123, as follows:

> "The non-extradition of nationals seems first to have arisen as a national policy between the Low

countries and France in the application of mutual ordinances for the surrender of criminals enacted by those two countries in 1736. This was due to the application in the territory of the former, in extradition cases, of the Bulle Brabantine, which guaranteed that the inhabitants should not be withdrawn from the jurisdiction of the local courts. France reciprocated.

"However, during the 18th century France made a treaty with Spain (1765), expressly providing for the extradition of nationals. An imperial decree issued by Napoleon expressly recognized the possibility of extradition by France of French nationals, but provided that a demand for such extradition should be submitted to the Emperor. Billot says that this decree was never given effect, and is supposed to have been nullified by the Charter of 1814, but Bonafos actually produces an Ordonnance d'Extradition of 1820 of a French citizen to the Canton of Geneva.

"In 1834 the rule against the extradition of nationals first found its place in a treaty, the parties very naturally being Belgium and France. Since then this provision has been included in all French treaties, except those made in 1843 with Great Britain and the United States, *but under those two treaties neither Great Britain nor the United States was able to obtain a Frenchman from France. It is interesting to note that France's practice denying extradition of her nationals, was firmly established for many years before her laws provided for their punishment in France for crimes committed abroad* (except crimes aimed at her own safety, money or financial interests). Before the middle of the 19th century the Belgian and French rule against the extradition of nationals was generally adopted on the European continent, whether states acted under treaties or on the basis of reciprocity, where it has persisted and has largely spread to Latin America" (italics ours).

It is true that it was not until the enactment by France of the Extradition Law of March 10, 1927, that French statute law expressly prohibited extradition of French nation-

als, (Harvard Research in International Law, Part I, Extradition, page 125), and that there existed some conflict among the French legal writers as to whether or not the Charter of 1814 prohibited such extradition.

However, the fact that it has been a principle of French public law that a French national could not be extradited, would seem to be clear from the preamble of the French Statute of June 27, 1866, concerning crimes committed abroad by French citizens, a translation of which reads:

> "Since the Charter of 1814, the prohibition against delivering French citizens to be tried by foreign courts, has become an established principle of our Public Law."

The views of Billot, mentioned in the foregoing excerpt from Harvard Research, are confirmed by the following extracts from the opinions of recognized French experts:

> "The refusal of extradition of nationals rests in France upon an old tradition of our national jurisprudence. It can be explained by the influence of the Law of Asylum, so generally recognized in former days as well as by the natural distrust of criminal tribunals formerly barbarous and whose impartiality was extremely doubtful when it came to the trial of foreigners. * * * Since 1830, the non-extradition of nationals is provided in every treaty signed by France. *(The first instance was the treaty with Belgium on November 22, 1834) and the circular of instruction of April 5th, 1841, treats it as a principle of our public law and of international jurisprudence. The same point of view is found in the proposed Law of 1879 on extradition, articles 3 and 5; and in the proposed law of 1900." Despagnet, *Public International Law*, pp. 324-325.
>
> "*(Note: The treaty of January 6th, 1909, between France and the United States, so provides in section 5.)
>
> * * * * * * *
>
> "On principle, all persons indicted or convicted, who seek refuge in a country, should and may be extra-

dited. But three exceptions are recognized by custom or by international treaties." * * *

"The second relates to nationals of the country of refuge." * * *

"Since 1830, we recognize that the rule excluding nationals from extradition had been put in our treaties; and the Circular of Instruction of April 5th, 1841, on the subject of extradition, established as a principle of our public Common Law the principle that sovereigns ought not surrender their nationals." *Garraud, On Criminal Law,* pp. 142, 143, 144.

The Circular of Instruction referred to by both of the foregoing writers was the Circular issued by the Minister of Justice to all District Attorneys of France (Procureurs Generaux) on the subject of extradition, containing the following statement:

"'Extradition of wrongdoers is subject to restrictions, of which you must take notice. *In the first place, sovereigns do not consent to the surrender of their nationals*" (italics ours).

In any event, it is clear that not since 1820 has a French citizen been extradited to a foreign country, even to the United States or Great Britain during the life of the Treaties of 1843, containing no exemption of citizens.

As recently as March 1923, the Government of France refused the extradition to the United States of one Mooney, a French citizen, who was charged with the commission of a burglary in the City of New York.

It is entirely clear that it is today the practice of France, as well as the express written law of France that a French national cannot be extradited. It is equally clear that this has been the consistent practice of the French Government since 1820. While it is not material in our view of the matter, we maintain also that it was the law of France at the time when the Treaty of 1909 was ratified, that a French national could not be extradited to the United States.

In devoting so much attention to the French law we are not unmindful of the conclusion of this Court in the *Charlton* case to the effect that the construction of an extradition treaty by a foreign government is entitled to little weight as against a contrary American construction. Our primary purpose in doing so is to explain the undoubted motives of the two governments in effecting a modification of the long standing Treaty of 1843. It is apparent from the foregoing exposition of French extradition law that the French Government must have intended to bring its extradition treaty obligations within the limitation of its internal extradition law and policy. It accomplished this by concurring in the use of language which as a result of many years of American interpretation had acquired a clearly defined meaning as excluding citizens.

That this reasoning is well founded is evidenced by the unsuccessful effort of France to induce the United States to accept the French construction of the earlier Treaty as exempting citizens. (*Moore, International Law Digest,* Vol. IV p. 298.)

Moreover, when the Extradition Treaty with France was made in 1909, there were already in existence seven extradition treaties containing the provision that, whereas neither contracting party should be bound to deliver up its own citizens for extradition under the Treaty,

> "either shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so."

These were the Treaties with Japan, of 1886, with Argentina, of 1896, with the Orange Free State, of 1896, with Mexico, of 1899, with Guatemala, of 1903, with Nicaragua, of 1905 and with Uruguay of 1905.

With these seven definite precedents existing at the time of the making of the French Treaty of 1909, is it likely that if the treaty making power of the United States had intended that there should exist any discretion in the American Government to extradite American citizens to France, it would

not have employed exactly this language in the French Treaty? By failing to employ this language and by using the same clause which already existed in fifteen other extradition treaties, and which had been construed by the Courts and by the Executive Department as preventing the extradition of American citizens, the intent would seem to be clearly manifested that there should be no discretion in the extradition of American citizens under the French Treaty.

We have seen that the Mexican Treaty of 1861, which contained exactly the same exemption as the French Treaty of 1909, was the subject of the interpretation of the Executive Department and of the Court in the *McCabe* case, *supra*, which denied the power of the Executive to extradite American citizens thereunder. In 1899, however, a new treaty with Mexico was concluded, in which it was provided that either of the contracting parties should have the power to extradite its own citizens in its discretion. If the American treaty-making power had considered that the treaty as it previously stood granted discretion in the matter of the extradition of American citizens, is it conceivable that it would have thus changed the Treaty?

Since the decision of this Court in the *Charlton* case, the United States has entered into sixteen new Extradition Treaties, in addition to the new treaty with Great Britain of December 22, 1931. The new Treaty with Great Britain, of course, contains no limitation as to the persons extraditable thereunder. Every other one of the new treaties thus made contains a clause substantially identical with that of the French Treaty of 1909. These Treaties are as follows:

With Paraguay, of 1913,
" Costa Rica, of 1922,
" Siam, of 1922,
" Venezuela, of 1922,
" Esthonia, of 1923,
" Latvia, of 1923,
" Bulgaria, of 1924,
" Finland, of 1924,
" Lithuania, of 1924,

With Rumania, of 1924,
" Poland, of 1927,
" Germany, of 1930,
" Austria, of 1930,
" Greece, of 1931,
" Albania, of 1933, and
" Iraq, of 1934.

If the American Government had intended to change its attitude with respect to the lack of discretion, it seems reasonable to suppose that instead of employing this clause unaltered in these new recent treaties, it would have added the same words found in the Argentine and other treaties to the effect that the government, through Congress and the President, should have a discretion in the matter.

The definite intent of the treaty-making powers of both the United States and France, to expressly exempt citizens from the operation of the Treaty of 1909, is, in our view, clearly established.

Reply to Petitioners' Points III and VI.

Point III of Petitioners' Brief is given over to a very labored attempt to prove that at the time of the negotiation of the Franco-American Extradition Treaty of 1909 France, at least, did not intend that the use of the phrase—

> "neither of the contracting parties shall be bound to deliver up its own citizens"

should exempt the nationals of the respective parties from the operation of the treaty.

We are unable to find in this point anything except a very strong argument in favor of our own position. Bearing in mind that the public policy and in reality the public law of France prohibited the extradition of a French citizen, consider the following quotation which the petitioners have cited from the exposé des motifs accompanying the American Treaty before the French Parliament:

> "Article V. gives to the two contracting parties the right not to deliver their nationals. This general

> principle, *which is part of our public law*, did not appear expressly in our previous treaties with the United States. The insertion of this provision has seemed useful to prevent any difficulty of interpretation." (Petitioners' Brief, p. 19.)

That the "difficulty of interpretation" had arisen out of the French efforts to obtain a construction of the old Treaty as exempting nationals, appears from the despatch of the Secretary of State cited at page 298 of Volume IV of Moore's Digest of International Law.

If, as is thus stated, the provisions of Article V of the Treaty were included to conform the Treaty with the general principles of French Public Law, then it must have been intended to exempt nationals from the operation of the treaty. In view of the state of the French Law in 1909, as set forth in the authorities, *supra*, it seems to us rather disingenuous to suggest that the French Government intended at any time to exercise any discretion with respect to the extradition of its own nationals to the United States.

Petitioners also quote at page 19 of their Brief from the exposé des motifs which accompanied the Franco-British Treaty of 1908 before the French Parliament. The language of that Treaty was that the parties—

> "shall be at liberty to refuse to the other the extradition of its own nationals."

In describing the purpose of this language to Parliament, the French Government said that it would—

> "permit the British Government to make possible by the extradition of its nationals the repression which it cannot exercise itself; * * *."

If the French Government considered that the purpose of the two Treaties was the same, why did it not say so in these exposé des motifs? Moreover, why did it not use the same language in the two treaties? The obvious answer

is that the phrase "shall be bound" was an American phrase, inserted at the insistence of the American Government and with the intent to exempt American nationals from the operation of the treaty.

In Point "VI" of their argument the petitioners, with illustrations from all of the Extradition Treaties made by the United States from 1789 to date, argue that the treaty-making power, instead of providing in this treaty that—

> "neither of the contracting parties shall be bound to deliver up its own citizens",

should have said that citizens of the asylum state—

> "shall not be surrendered",

if it intended to leave "no opportunity for discretion".

The primary defect in this argument lies in the fact that the treaty-making power, in order to accomplish its purpose, had only to pluck from existing extradition treaties a clause which through long usage had acquired an undisputed significance. The diplomatic draftsman, no less than his fellows in other fields, is prone to prefer time honored phraseology when suitable to his purpose. As the majority of the Circuit Court of Appeals has so aptly stated in this case:

> "* * * we are dealing with a clause chosen by the President and Senate out of the diplomatic locker and encrusted with its proper traditions, which in such matters account for much" (81 Fed. (2) 35).

Petitioners suggest in support of this point that the State Department might have followed the precedent of the Treaty of 1855 with the two Sicilies. It should suffice to know, however, that this Treaty was superseded in 1868 by the Treaty with the Kingdom of Italy and was therefore not available in the diplomatic locker in 1909 (IV Moore, International Law Digest, 295).

Moreover, Judge Manton himself, in the article in the *Temple Law Quarterly* hereinbefore referred to, assimilates the clause—

"no Government shall be bound"

to the clause—

"shall not deliver up",

by characterizing both as prohibitions against the extradition of nationals:

> "When we study the treaties concluded between nations, we find in most of them, the same policy of opposition to the extradition of nationals. *Generally, the prohibition is framed something like this:* the contracting states agree to give up criminals 'with the sole exception of their nationals' (a la seule exception de leurs nationaux); or except when 'the person claimed is a native or citizen of the country, to whose government the request is made'; or 'but *no Government shall be bound to grant the extradition of its own citizens'*; or 'excepting subjects'; *or 'shall not deliver up' a citizen.*"
>
> (Temple Law Quarterly, Vol. X [Nov. 1935], pp. 13, 14, italics ours).

POINT III.

A construction of the French Extradition Treaty of 1909 as vesting discretion in the Executive to extradite American citizens, would be unconstitutional.

It is a fundamental principle of American Constitutional law that a treaty, as well as a statute, must not conflict with the positive prohibitions of the Constitution.

In the *Cherokee Tobacco case,* 11 Wall (U. S.) 616, at page 620, it is held:

> "It need hardly be said that a Treaty cannot change the Constitution or be held valid if it be in

violation of that instrument. This results from the nature and fundamental principles of our Government."

In *Doe* v. *Braden*, 57 U. S. 635, at page 656, the following appears:

"The Treaty is therefore a law made by the proper authority and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the constitution of the United States."

To the same effect is *Geoffroy* v. *Riggs*, 133 U. S. 266.

At page 160 of *Crandall on Treaties*, authorities are collated which establish clearly that a Treaty is the equivalent of an Act of Congress, whenever it operates of itself without the aid of any legislative provision. At page 246 thereof the following limitation, as expressed by Calhoun, is quoted:

"Whatever, then, concerns our foreign relations; whatever requires the consent of another nation, belongs to the treaty power; can only be regulated by it; and it is competent to regulate all such subjects; provided, and here are its two limits, such regulations are not inconsistent with the Constitution. If so they are void. No treaty can alter the fabric of our government, nor can it do that which the Constitution has expressly forbade to be done; nor can it do that differently which is directed to be done in a given mode, and all other modes prohibited."

(Crandall, Treaties, Their Making and Enforcement (Second Edition) p. 246).

We may assume, therefore, *arguendo*, that the provisions of an extradition treaty to the effect that neither party shall be bound to surrender its own citizens, is susceptible of the construction placed thereon by the British Court in the *Galwey* case, and that as so construed it vests in the Executive Department of the Government a discretion as to such surrender.

If so, by what standard is the Executive to be guided in the exercise of this discretion as between American citizens,

charged with extraditable offenses under the Treaty? Is it not entirely clear that under such an interpretation of the Treaty the discretion of the President would be absolute and unfettered? Could not the President, under such an interpretation, exercise an arbitrary discretion to extradite one American citizen and, at the same time, refuse to extradite another similarly situated?

Is it not obvious, therefore, that to vest such a discretion in the President would be, in effect, to *delegate to him alone the treaty-making power*, which, by the Constitution, is vested in the President and the Senate?

There can be no doubt that to vest a similar discretion in the President by statute would be an unlawful delegation of the legislative power, in violation of the provisions of Article I, Section 1 of the Constitution, because of the absence of any standard for the exercise of such discretion.

In the recent decision of this Court in the case of *Schechter* v. *United States*, 295 U. S. 723, in concluding that the National Industrial Recovery Act was unconstitutional in that it contained an unlawful delegation of the legislative power, the Court stated the controlling principle as follows:

> "To summarize and conclude upon this point: § 3 of the recovery act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure.
>
> Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, § 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in § 1.
>
> In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered.

> We think that the code making authority thus conferred is an unconstitutional delegation of legislative power'' (p. 901).

There can be no difference in principle between the unconstitutional attempt to delegate an unfettered discretion to the Executive Department by legislation and a similar attempt by treaty. A treaty is by our Constitution made the equivalent of an Act of Congress. The treaty powers are vested in the President and the Senate concurrently. For the Senate and the President acting concurrently by a treaty to attempt to delegate to the President alone the Treaty making power, must be as objectionable under the Constitution as an unlawful delegation of the legislative function.

The more serious constitutional objection, however, to a construction of this Treaty which would vest in the Executive Department an unfettered discretion in the extradition of American citizens, is found in the Fifth Amendment to the Constitution, requiring due process of law. It will serve no useful purpose to collate the authorities upon what does and what does not constitute due process of law in connection with the personal liberty of an individual. It is sufficient to note that the President of the United States has no express or implied power, in the absence of Treaty or legislation, to deport from the United States any person, whether citizen or not.

To provide by Treaty that the President must deport by extradition, non-citizens, under certain conditions fixed by the Treaty, but that he shall have an absolute discretion, unguided by any standard, to deport or to refuse to deport an American citizen, is quite clearly to place in the hands of the President an *arbitrary* power over American citizens.

In *Giozza* v. *Tiernan*, 148 U. S. 657 a standard directly applicable to the present situation was thus stated:

> "Due process of law within the meaning of the Amendment is secured if the laws operate on all

> alike, and do not subject the individual to an arbitrary exercise of the powers of government" (p. 662).

To subject an American citizen to an arbitrary exercise of the discretion of the Executive, would thus constitute the clearest deprivation of due process of law, because it would render possible an arbitrary "discrimination in favor of one as against another of the same class" (*Giozza* v. *Tiernan, supra,* p. 662).

In the *McCabe* case, *supra,* the lack of power in the Executive to extradite in the absence of a positive treaty obligation, is placed, as it should be, upon constitutional grounds, as follows:

> "If it were otherwise, if the Executive could at his option and in his discretion transport for trial to a foreign country a person accused of crime, he would in such cases exercise a power which, it is thought, finds no sanction under our constitutional form of government. While nations are not careful to screen criminals seeking an asylum in their midst, personal liberty is so jealously guarded by the American Constitution that its safety and security should not be dependent upon the exercise of the arbitrary will and discretion of any official, however lofty his official station" (p. 375).

It may be suggested that the inclusion in four of our extradition treaties (those with Guatemala, 1903; Mexico, 1899; Nicaragua, 1905; Uruguay, 1905) of the clause providing that the Executive authority shall have the power to deliver up its own citizens, if, in its discretion, it be deemed proper to do so, evidences the view of the treaty-making power of the United States that such a discretion may be lodged in the Executive Department of the American government.

If, by this suggestion, it is meant that the Executive may arbitrarily choose between two American citizens, in all respects similarly situated, for purposes of extradition, then we insist that this language must fail of its purpose

because of the constitutional limitations hereinbefore discussed.

Moreover, the full constitutional argument as to the lack of any discretion in the Executive Department of the American Government to extradite an American citizen in the absence of a direct treaty obligation, was made before this Court in the case of *Charlton* v. *Kelly, supra.* Consequently, the conclusion of the Court that all our treaties, except those containing no modification of the word "persons", are to be classified as expressly exempting American citizens from their operation, must clearly be deemed to have been made with a full knowledge of the constitutional questions involved, and to have included in this category even those four treaties in which a discretion is sought to be expressly given to the American Executive. If this Court had not had this view in mind, it would necessarily have classified these four treaties in a third category in which a discretion rested with the Executive in the matter of the extradition of American nationals.

The petitioners argue that the Extradition Statute, in giving the Executive the final word on extradition in every case, confers an arbitrary discretion upon him similar to that which Petitioners seek to read into the French Treaty. Suffice it to say, that the so-called discretion exercised by the Executive under the Extradition Statute is no more than a quasi-judicial function, far removed from the arbitrary discretion here contended for.

In the very opinion of the Attorney General to which petitioners refer at page 13 of their Brief, it is said:

> "I am of the opinion that the proceedings below come before you [The Secretary of State] upon a *quasi certiorari*, and that your discretion extends to a *review* of every question therein presented."
>
> (17 Op. Atty. Gen. 184, 185, italics ours.)

To this effect also are *In re Stupp*, 23 Fed. Cas. 296 at 302, and *In re Ezeta*, 62 Fed. 972 at 996.

Reply to Petitioners' Points "I" and "VII".

A discussion of these two points of the Petitioners' argument requires only a consideration of the *Galwey* case decided by the Queen's Bench Division of the English High Court of Justice and of its possible application as an aid in the interpretation of this Treaty.

The primary reason for its inapplicability in the case at bar is admirably stated in the majority opinion below. In our view there are additional reasons why the decision can have no bearing upon our problem. We shall therefore discuss it under the three following heads:

(a) It was rendered under a constitutional system peculiar to England and different from our own.

(b) It was based upon an Extradition Law peculiar to England and upon evidence of a different intent in the treaty-making power.

(c) It conflicts with controlling American judicial authority.

a.

The fundamental difference between the British and American constitutional system is explained in detail by this Court in the case of *Hurtado* v. *United States*, 110 U. S. 516 at 531, as follows:

> "The concessions of Magna Charta were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; for notwithstanding what was attributed to Lord Coke in Bonham's Case, 8 Rep. 115, 118 a, the omnipotence of Parliament over the common law was absolute, even against common right and reason.

The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.

"In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

"It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property."

It will thus be seen that in the English Constitutional system there is no limitation upon the legislative power and that consequently the British Parliament may, by legislation, delegate to the executive unfettered, discretionary power. This, as we have seen, cannot be done in the United States under our constitutional system.

Consequently, in the interpretation of English statute and treaty, the Courts are not constrained to interpret them so as to conform with constitutional prohibitions against delegation of legislative power and deprivation of due process of law.

It is obvious, therefore, that a decision rendered under such an entirely different constitutional system can be of little or no persuasive force in the United States, as against

the positive prohibitions of the Constitution. That such is the view of the Supreme Court, appears in *U. S.* v. *Rauscher*, 119 U. S. 407:

> "The only English work on the subject of extradition we have been able to find which discusses this subject is a small manual by Edward Clarke of Lincoln's Inn, published in 1867. He adopts the same view of the construction of this treaty and of the general principles of international law upon the subject which we have just indicated.
>
> "Turning to seek in judicial decisions for authority upon the subject, as might be anticipated *we meet with nothing in the English courts of much value, for the reason that treaties made by the Crown of Great Britain with other nations are not in those courts considered as part of the law of the land, but the rights and duties growing out of those treaties are looked upon in that country as matters confided wholly for their execution and enforcement to the executive branch of the government.* Speaking of the Ashburton Treaty of 1842, which we are now construing, Mr. Clarke says, that, 'In England the common law being held not to permit the surrender of a criminal, this provision could not come into effect without an Act of Parliament, but in the United States a treaty is as binding as an Act of Congress.'" Clarke on Extradition, 38" (p. 417, italics ours).

The group of scholars, who in 1935 edited the Harvard Research in International Law, *supra*, recognize a clear distinction, upon constitutional grounds, between the British and American law in this regard. They state in the following quoted passage, that under British law a treaty provision declaring that no party is compelled to extradite its nationals, leaves the Executive power freedom of action in the matter, but that under American law, a similar treaty clause leaves the American Executive without constitutional power to surrender an American citizen:—

> "Great Britain and the United States have favored the extradition of nationals. To meet the

> desires of other contracting parties, however, Great Britain has at times put clauses in extradition treaties forbidding surrender of nationals, but she has recently been substituting for such provision a clause declaring merely that no party is compelled to extradite its nationals, thus leaving to herself freedom of action in the matter. 'In negotiating extradition treaties the United States has oftentimes sought the omission of a common provision exempting a contracting party from the duty to surrender its own nationals. The attempt has, however, rarely been successful * * *'. In several instances during the middle of the last century, negotiations were broken off by the United States because of the fact that the other country refused to surrender its nationals. *Nevertheless, to facilitate extradition so far as it is possible, we have come to accept a clause providing that the parties are not under a duty to extradite their nationals when other States insist upon it*" (italics ours.)

In a note to the italicized sentence, it is stated, upon the authority of Moore on Extradition:—

> "under such treaty the President has no constitutional power to surrender a national."
>
> (Harvard Research in International Law, Part I, Extradition, p. 124 and note 10.)

It is thus shown that, under the English system, the scope of the power of extradition, which may be absolute and arbitrary, must be sought for in an Act of Parliament. If an Act of Parliament grants a broad and even arbitrary power to the executive authority in the matter of extradition, and if the treaty making that Act applicable to a foreign state does not expressly curtail such broad power then the broad power continues to exist unimpaired. That is the exact situation which was found to exist in the *Galwey* case.

The English Extradition Act of 1870, in Section 6 thereof, provides that where that Act is made to apply by treaty in

the case of any foreign state, every fugitive criminal of that state, who is in or suspected of being in that part of Her Majesty's Dominions covered by the treaty, shall be liable to be apprehended and surrendered in the manner provided by the Act. It is at once apparent that this Act creates a power in the executive to surrender for extradition any person, whether a British subject or not. It confers upon the executive authority the broadest possible power, without constitutional limitation, except that some Treaty must exist making the statute applicable to the foreign state demanding the fugitive.

Fundamentally, therefore, in the *Galwey* case the Extradition Act of 1870, permitting the extradition of a British subject or alien, was applicable because a treaty did exist between Great Britain and Belgium. The only consideration was as to whether or not it was the intention of the Belgian Treaty to cut down the broad power existent in the executive so as to expressly prohibit the extradition of British subjects. The intent of the treaty making power in this regard was considered in the light of the history and peculiar background of the existing Belgian Treaty. The Court concluded, in effect, that the original treaty was altered for the purpose of *enlarging its scope* so as to include British subjects.

b.

The Extradition Treaty between Great Britain and Belgium in force in 1876 contained the following stipulation:

> "* * * it is agreed that Her Britannic Majesty and His Majesty the King of the Belgians shall on requisition made in their name by their respective diplomatic agents, deliver up to each other reciprocally any persons * * * *except as regards Great Britain, native born and naturalized subjects of Her Britannic Majesty.*" (Italics ours.)

In 1877, the British Courts in interpreting similar language in a Treaty with Switzerland, concluded that this

language expressly cut down the broad power of extradition granted to the British executive by the Extradition Act of 1870. In arriving at this conclusion the Court said:

> "It is not that one country shall not be bound to deliver up, but that no subject shall be delivered up to the other country."
> (*Reg.* v. *Wilson*, 1877, 3 Q. B. 42, at 46.)

After that decision, and in 1887, the Treaty with Belgium was modified and the words above set out which expressly excepted the subjects of the respective contracting parties, were replaced by the provision that neither of the contracting parties should be bound to surrender its own subjects.

Upon this history, the British Court in the *Galwey* case, quite properly concluded that it was the clear intention of the treaty-making power by the modification of the Belgian Treaty made in 1887 to follow the Court's suggestion in *Regina* v. *Wilson*, and to leave the matter of extradition of its own nationals one of discretion in the Executive.

The following excerpts from the argument of counsel for the government and from the opinion of the Court in the *Galwey* case establish the foregoing conclusion:

Argument of Counsel for the Government, p. 232:

> "The treaty of 1876 with that country did no doubt contain an exception which prevented the extradition of British subjects; and under very similar excluding words in the treaty with Switzerland, the case of Reg. *v.* Wilson was decided in 1877 where the court expressed regret that they were prevented by the terms of that treaty from surrendering a British subject accused of offenses in a foreign country. *In consequence, no doubt, of that decision and of the expression of opinion by the court, the declaration in 1887 was signed by the British and Belgian governments.* The language of that declaration is practically the language used by Field, J., at the end of his judgment in Reg. *v.* Wilson (1), and its effect is not to create or to continue a prohibition against the surrender of a British subject, but to vest in the Executive Government a discretion as to such surrender."

Opinion of Court, p. 234:

"The question for *our* determination turns upon the construction of the Extradition Act, 1870, into which and in connection with which are to be read the terms of the treaty. Now the treaty, originally made in 1872, was modified in 1876, and, as modified, it contained this stipulation: 'it is agreed that Her Britannic Majesty and His Majesty the King of the Belgians shall on requisition made in their name by their respective diplomatic agents, deliver up to each other reciprocally any persons'—then follows these words, for which I cite the passage—'except as regards Great Britain, native-born and naturalized subjects of her Britannic Majesty.' Now, as the treaty then was, assuming that Reg. *v.* Wilson (1) was properly decided, the Extradition Act would not have authorized the extradition of the criminal, because from the liability to extradition were excepted native-born and naturalized subjects of the Queen. That Reg. *v.* Wilson (1) decides, and I think, rightly decides. I do not stop to inquire whether, even if the treaty did not apply, there might not have been some other steps taken by the executive government with a view to extradition. That being the original form of the treaty, *it was subsequently altered, and it is quite probable, as was suggested by the Attorney-General in argument, that it was altered because of the decision of Reg.* v. *Wilson* (1), or other decisions to the same effect; for in Reg. *v.* Wilson (1) Cockburn, C. J., expresses regret that this country should not be enabled under the extradition law then existing to deliver up in proper cases even British subjects who have offended against the laws of another country. *Accordingly, in 1887, the treaty was designedly altered;* the excepted words—that is to say, the exception which excluded native-born and naturalized subjects of the Queen altogether from extradition under the statute and the then existing treaty—were altered thus; the words I have mentioned were excluded, and the following substituted: 'In no case nor on any consideration whatever shall the high contracting parties be bound to surrender their own subjects whether by birth or naturalization.' What does that mean? It

surely means that, while they are not bound, *they may under the treaty and any legal enactment which relates to the treaty make such extradition.*" (Italics ours.)

In the *Galwey* case, therefore, the Court was seeking the intent of the treaty making power and found it in the history of the treaty in question.

We must, as did the British Court, seek the intention of the treaty making power. We find it to be contrary to that in the *Galwey* case, basing it upon the same factors, namely, the expressions of the Executive and the decisions of our courts. As we have already pointed out, the intention of our Treaty making power to exempt American citizens is clear from the fact that the exemption clause was included in the Treaty in 1909, at a time when the meaning of the clause had been clearly established by executive construction and judicial decision.

The *Galwey* decision is thus distinguishable upon either or both of two grounds:

First: The Court was interested solely in ascertaining the intent of the treaty making power and deciding accordingly. In this respect the decision is in our favor. By a parity of reasoning the Court would have been compelled to the conclusion for which we contend under the French Treaty. In the one instance, a limited treaty had been liberalized. In the other, an unlimited treaty had been curtailed by the addition of language which had acquired a well defined and limited meaning.

Second: While the construction placed upon the Treaty by the British Court was doubtless proper in Great Britain, such a construction placed upon an American treaty would render the treaty unconstitutional.

c.

The mere fact that the decision in the *Galwey* case was contrary to the American decisions in *Charlton v. Kelly* and

In Re McCabe, supra, would be sufficient, even if it were otherwise persuasive, to destroy its value as a precedent in the United States.

CONCLUSION.

It is respectfully submitted that the judgments of the Circuit Court of Appeals herein should be affirmed.

October 1, 1936.

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